

Hon. Thomas S. Zilly

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

LVB-OGDEN MARKETING, LLC,

Plaintiff,

v.

DAVID S. BINGHAM, SHARON BINGHAM,
CHRISTOPHER BINGHAM, CHERISH
BINGHAM, KELLY BINGHAM, BINGO
INVESTMENTS, LLC, CCRB
ENTERPRISES, LLC, PARK PLACE
MOTORS, LTD., HYTECH POWER, INC.,
CICILIA ELALI (f/k/a CICILIA PARK),
HENRY DEAN, in his individual capacity and
as Trustee for the SHARON GRAHAM
BINGHAM 2007 TRUST, and BGH
HOLDINGS, LLC,

Defendants.

Case No. 2:18-cv-00243-TSZ

HENRY DEAN (INDIVIDUALLY) AND
BGH HOLDINGS, LLC'S
SUPPLEMENTAL BRIEFING

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I. INTRODUCTION AND BACKGROUND

The Court's Minute Order of August 17, 2018 [Dkt. No. 132] directed each party to file one supplemental brief, not to exceed 24 pages, addressing three issues, including Issue 3, "Whether the Court should bifurcate the trial into two or more stages." Minute Order at 2. Henry Dean in his individual capacity and BGH Holdings, LLC ("BGH") submit this brief on the issue of trial bifurcation. Henry Dean (individually) and BGH agree with, adopt, and incorporate by reference the positions taken and argued by other defendants in their supplemental briefing as to Issue 1 (priority of judgments) and Issue 2 (order from this Court prior to execution on certain assets), and present this brief addressing Issue 3, whether trial should be bifurcated. Trial should not be bifurcated.

In the parties' Joint Status Report filed with the Court on August 10, 2018 [Dkt. No. 127], Plaintiff LVB-Ogden Marketing, LLC, requested that trial in this matter be bifurcated into two phases (or in the alternative that the Court order briefing on the issue of bifurcation). Plaintiff proposed that Phase 1 would try LVB's declaratory judgment claim as to self-settled assets, the Trust's spendthrift defense, and the Fisher Trusts, and only if necessary, Phase 2 would try LVB's fraudulent transfer claim. *See* Joint Status Report at 5-6.

Defendants' position as stated in the Joint Status Report is that this case cannot be resolved in favor of LVB as a matter of law, and that there is no reason to divide the case into multiple phases and multiple narrow hearings. Joint Status Report at 6. Defendants pointed out strong reasons not to bifurcate, arguing that the facts and defenses relevant to the transfers at issue overlap the facts and defenses relevant to LVB's effort to disregard the Trust, and pointing out that the court cannot assess the transfers that LVB alleges are "self-settled"

without examining the structure and consideration for those transfers. *Id.* Defendants argued that the multiple phased approach advocated by LVB would require duplicative examinations of the same transfers and unduly delay a full resolution. *Id.*

II. AUTHORITY AND ARGUMENT

A. The burden of proof is on the party seeking bifurcation, bifurcation is generally denied where issues and evidence overlap, and bifurcation of trial is the exception, not the rule.

Whether to bifurcate a trial is within the discretion of the district court. *Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1139 (9th Cir.1991). Rule 42 of the Federal Rules of Civil Procedure provides in pertinent part:

For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

CR 42(b). The party seeking bifurcation has the burden of proving that bifurcation is justified given the facts in the case. *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144 F.R.D. 99, 101, (N.D. Calif. 1992). A district court does not abuse its discretion in denying a motion to bifurcate trial when, given an overlap in the evidence used to prove a plaintiff's claims against multiple different defendants, bifurcation would be costly and unnecessary. *Willis v. Vasquez*, 648 F. App'x 720, 722 (9th Cir. 2016), citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004). Bifurcation is not warranted due in part to overlapping issues that would require evidence to be presented to two separate juries in two trials. *Real v. Bunn-O-Matic Corp.*, 195 F.R.D. 618, 624 (N.D. Ill. 2000).

1 The court did grant a request to bifurcate in *Smith v. Alyeska Pipeline Service Co.*, 538
 2 F.Supp. 977 (D. Del. 1982), but in that case the moving party presented evidence that the
 3 issue of damages was complex and would require a review of millions of documents and
 4 require extensive time during discovery and trial; additionally, the moving party showed that
 5 the issues of liability and damages did not overlap.
 6

7 To determine whether bifurcation is warranted, courts generally consider the
 8 following three factors: 1) whether significant resources would be saved by
 9 bifurcation, 2) whether bifurcation will increase juror comprehension, and 3)
 10 whether bifurcation will lead to repeat presentations of the same evidence and
 11 witnesses. The moving party bears the burden of establishing that bifurcation
 12 is warranted. In all cases... bifurcation is the exception, not the rule.

13 *Computer Assocs. Int'l, Inc. v. Simple.com, Inc.*, 247 F.R.D. 63, 67 (E.D.N.Y. 2007)(citations
 14 and internal quotation marks omitted).

15 Courts have used a three-step process in determining whether to bifurcate a trial:

16 First, the trial judge must determine whether separate trials would avoid
 17 prejudice to a party or promote judicial economy. Only one of these criteria—
 18 avoidance of prejudice or judicial economy—need be met before a court can
 19 order separation. Next, the court must be satisfied that the decision
 20 to bifurcate does not unfairly prejudice the non-moving party. Finally,
 21 separate trials must not be granted if doing so would violate the Seventh
 22 Amendment. Although the ultimate decision to bifurcate is within our
 23 discretion, because we are expected to act to “secure the just, speedy, and
 24 inexpensive determination of every action” (Fed. R. Civ. P.
 25 1), bifurcation remains the exception, not the rule. The party seeking
 26 separate trials has the burden of showing that judicial economy would be
 27 served and the balance of potential prejudice weighs in favor of bifurcation. In
 determining whether to bifurcate a trial, courts have looked to judicial
 efficiency, possibility of needless delay, potential juror confusion, the timing
 of the request for bifurcation, whether any filing delay was tactical, the
 overlap of evidence and witnesses between the two trials, and prejudice to
 each party.

1 *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 431 F. Supp. 2d 834, 836–37 (N.D. Ill.

2 2006)(internal case citations and some internal quotation marks omitted).

3
4 **B. There is considerable overlap as to facts, issues, and defenses, leading to**
5 **duplicative presentations of evidence and argument, and judicial inefficiency.**

6 LVB seeks to disregard the Sharon Graham Bingham 2007 Trust (the “Trust”),
7 arguing that LVB is entitled to execution of Trust assets, and alleging in its First Amended
8 and Verified Complaint [Dkt. No. 82] (the “Amended Complaint”), inter alia, that multiple
9 transfers to the Trust are “self-settled” transfers (¶ 118a), that the Trust has lost any
10 spendthrift character that it had (¶ 118b), and that any transfer or obligation including
11 granting of security interests between certain individuals and the Trust is void as to LVB (¶
12 118c). Appendix A of Plaintiff’s First Amended and Verified Complaint [Dkt. No. 82] lists
13 well over 200 transactions Plaintiff alleges at ¶ 42 were all “self-settled” transactions.
14

15 As a second cause of action, Plaintiff alleges violation of the Uniform Fraudulent
16 Transfer Act (RCW 19.40 *et seq.*). *See* Amended Complaint at ¶¶ 120-130. Plaintiff refers to
17 CCRB Enterprises, LLC, SKBB Enterprises, LLC, Park Place Motors, Ltd., the Trust, Henry
18 Dean in his individual capacity, BGH Holdings, LLC, and HyTech Power, Inc., as
19 “Fraudulent Transferees.” Amended Complaint at ¶ 121. Among the transfers LVB alleges
20 were fraudulent are many of the transfers listed in Appendix A to its Amended Complaint,
21 which it also claims were “self-settled” transfers. Amended Complaint at ¶ 126.
22

23 The Court cannot assess the transfers that LVB alleges are “self-settled” without
24 examining the structure and consideration for those transfers. The structure and consideration
25 of the transfers is also basic to determining whether the transfers were fraudulent. Therefore it
26

1 is more conducive to judicial economy to present and examine the facts surrounding each
2 transfer just once in determining whether each such transfer was self-settled or fraudulent.
3

4 Many affirmative defenses asserted by the various defendants overlap. For example,
5 Park Place Motors Ltd. and HyTech Power, Inc. have asserted a laches and lapse of time
6 affirmative defense, which overlaps with the fraudulent (voidable) transfer extinguishment
7 (statute of limitations) defense. See [Dkt. No. 136] First Amended Answer of Defendants
8 Park Place Motors, Ltd. and HyTech Power, Inc. to Plaintiff's Amended Complaint at 12, ¶¶
9 4-5. These defendants have also asserted overlapping affirmative defenses of assets being
10 fully encumbered at time of transfer or otherwise beyond the purview of RCW 19.40 et seq.,
11 and that transfers lacked value at time of transfer. Id. at 13, ¶¶ 19, 22.
12

13 David S. Bingham, Sharon Bingham, Christopher Bingham, Cherish Bingham and
14 Kelly Bingham (collectively, the "Bingham Individuals") along with Bingo Investments LLC,
15 CCRB Enterprises LLC, and SKBB Enterprises LLC have also asserted overlapping
16 affirmative defenses of laches and statute of limitations. See [Dkt. No. 130] their Answer to
17 First Amended Complaint at 16, ¶¶ 140-141. These defendants have also asserted the
18 affirmative defenses of assets fully encumbered at time of transfer and that transfers were of
19 property encumbered by a valid and enforceable lien. Id. at 18, ¶¶ 163, 166.
20

21 As a final point, LVB has requested a jury trial. To empanel two juries, to hear much
22 of the same evidence and consider many of the same facts regarding the same transactions, is
23 not efficient.
24
25
26

C. Even if Plaintiff LVB were to prevail on two of the trust issues it seeks to have tried first, a second trial would probably still be necessary.

LVB seeks to collect a judgment in excess of \$70 million. *See* First Amended and Verified Complaint [Dkt. No. 82] at 1, ¶ 3. The net value of assets of the Trust is significantly less than the amount LVB seeks (*see e.g.* Amended Complaint at ¶¶ 82-83; estimated net value as of May, 2017 of \$13,588,612). Therefore, even if Plaintiff LVB were to prevail on both the self-settled assets issue and the spendthrift issues it seeks to have tried first, much if not most of the judgment (plus interest and attorney fees) would still remain unsatisfied. The second trial, as to fraudulent transfers of assets, rather than being rendered unnecessary by the first trial, would probably still need to go forward. Thus trial bifurcation would lead to inefficiency and wasted resources, not judicial efficiency.

D. Bifurcation would prejudice defendant Henry Dean.

Bifurcation would prejudice defendant Henry Dean (in his individual capacity) because bifurcation into two trials would mean that this matter will remain unresolved for a longer time as to him. Mr. Dean is a defendant only as to the Uniform Voidable Transactions Act (“UVTA”) (Chapter 19.40 RCW) portion of the case, and not as to the issues of self-settled Trust assets, whether or not the Trust has a valid spendthrift provision, or as to the Fisher Trusts. Plaintiff LVB is proposing to try the UVTA (UFTA) portion of the case not until the second of the bifurcated trials. Mr. Dean however is entitled to an expedited trial. RCW 6.32.270. Furthermore, the Federal Rules of Civil Procedure are to be “construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. Bifurcation in

1 this matter will only prolong and complicate the proceeding as to Mr. Dean, and Mr. Dean
2 will therefore be prejudiced.
3

4 **III. CONCLUSION**

5 For the reasons stated above, Defendants Henry Dean (in his individual capacity) and
6 BGH Holdings, LLC, argue that trial in this matter should not be bifurcated.

7 Dated this 21st day of September, 2018.
8

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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